BEFORE
THE FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C.

In the Matter of	)	
	)	
Presubscribed Interexchange Carrier	)	CC Docket No. 02-53
Charges.	)	CCB/CPD File No. 0112
	)	RM 10131

COMMENTS OF THE
NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES

In 1984 -- more than 18 years ago -- the Federal Communications Commission ("Commission") created a $5 "safe harbor" standard rate that could be charged to consumers by their local exchange carrier ("LEC") when consumers changed their presubscribed interexchange carrier ("IXC").[1] In the current rulemaking, the Commission is reexamining that safe harbor. As the Commission stated in the current Order and Notice of Proposed Rulemaking ("NPRM") released March 20, 2002,

> The current safe harbor was established based on the difficulty of assessing actual costs by carrier for this service, what was known generally about the costs of providing this service, and a determination that it was good public policy to discourage excessive switching of carriers. All three of these factors are now ripe for reexamination.

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[1] *Investigation of Access and Divestiture Related Tariffs*, CC Docket No. 83-1145, Phase I, Memorandum Opinion and Order, 55 Rad. Reg.2d (P&F) 1422, App. B, 13-5 (April 27, 1984) ("*1984 Access Tariff Order*").

NPRM, ¶ 8 (footnote omitted). The National Association of State Utility Consumer Advocates ("NASUCA") submits that, so long as LECs are reimbursed for the incremental cost of switching customers from one IXC to another, the level of switching -- whatever that level may be -- cannot be deemed excessive. For the reasons recognized by the Commission, the current incremental cost must be well below $5.00.

NASUCA is an association of 42 consumer advocates in 40 states and the District of Columbia. NASUCA's members are designated by the laws of their respective states to represent the interests of utility consumers before state and federal regulators and in the courts.[2]

From the consumer and consumer advocate perspective, the ability to freely switch IXCs is one key benefit of the last twenty years of telephone regulation.[3] The existence of a variety of carriers with differing rates, rate structures and rate plans and other variations on long distance service provides consumers with the choice that is the very essence of a competitive market.[4] Barriers that make switching more expensive constrain the benefits of a competitive market. As the Commission states, "Today the long distance market is highly competitive, and we believe the ability of end users to

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[2] See, e.g., Ohio Rev. Code Chapter 4911.

[3] This is one of the reasons that it is crucial for the Commission to retain the equal access and nondiscrimination policies that are currently being evaluated in CC Docket No. 02-39.

[4] Of course, wide possibilities for choice also raise the specter of unreasonable, unconscionable or discriminatory practices by the competitive carriers. As discussed herein, lowering the cost to the customer of switching carriers provides a strong disincentive against such practices.

change carriers easily has contributed to the competitiveness of that market." NPRM, ¶ 8.[5]

High costs to switch carriers also discourage switching by low use customers, for whom the switching cost may exceed a month's long distance bill. Low use customers are less likely to be targeted by carriers that offer to waive the switching fee.

By initiating this rulemaking, the Commission has rejected the ILECs' arguments that a rulemaking is not needed.

In paragraphs 8-13 of the NPRM, the Commission discusses in detail its reasons for initiating this rulemaking. This explanation compellingly rejects the various ILECs' argument that a rulemaking would not be in the public interest. See, e.g., SBC Comments at 7; USTA Comments at 3; CBT Comments at 3.[6]

The Commission should set a substantially lower safe harbor for switching fees.

The Commission cites to the BellSouth $1.49 carrier change charge. NPRM, ¶ 20. The BellSouth charge (set at $1.49 in 1990) was put into evidence in the MCI complaint, as was the $2.30 carrier change charge assessed by Southern New England Telephone Company ("SNET") that went into effect in 1995. *In the Matter of MCI v. US West, et al.*,

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[5] Under the U.S. Department of Justice merger guidelines, the long distance market is more accurately described as "concentrated," given the market shares of the largest IXCs. See http://www.usdoj.gov/atr/public/testimony/hhi.htm.

[6] Verizon minimized the need for a rulemaking on PIC change charges because the $5 safe harbor charge was dwarfed by the "bounty payments" that IXCs paid to gain or retain customers. Verizon Comments at 2. Such bounty payments are no longer common industry practice.

File No. E-97-08 *et al*., Memorandum Opinion and Order, 15 FCC Rcd 9328 (2000) ("*MCI Order*") at ¶ 7.[7]

NASUCA does not currently have access to the ILECs' estimates of their actual switching costs. If ILECs other than BellSouth believe that their actual costs are greater than $1.49, they should be submitting those costs to the Commission in this docket.[8]

The Commission should carefully review any such cost submissions. At this point in the record, however, there is as much of a basis for the Commission to adopt a carrier change charge safe harbor of $1.49 (or less) as there was to adopt the $5 charge in 1984.[9]

As the Commission knows, the use of a safe harbor has significant administrative advantages. Principally, it avoids the need for the Commission to examine cost studies, other than for carriers that claim to have costs higher than the safe harbor amount.[10]

There is also something to be said for at least the semblance of uniformity provided by a safe harbor. With the safe harbor, it is possible for LECs to have PIC-change charges below the safe harbor amount, as BellSouth and SNET had charges below the $5 safe harbor. It is also possible that a LEC would have a charge above the safe

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[7] In its comments, CBT argued that the Commission must recognize the differences in costs among different-sized carriers. CBT Comments at 4-5. CBT's costs may well be more comparable to SNET's than to BellSouth's, but that does not mean that CBT's carrier change charge should stay at $5.

[8] As noted below, the costs to be included in a PIC-change charge should be only the costs associated with performing the switch, not costs associated with, *inter alia*, investigating slamming complaints.

[9] As the Commission describes the earlier comments of some carriers, "They note that evidence of one carrier's 1990 costs may not be the best evidence of current nationwide costs for carriers." NPRM, ¶ 7. NASUCA agrees.

[10] In the NPRM (at ¶ 14), the Commission also raises the possibility that it "should review rates solely through our enforcement processes." With all due respect to the Commission, NASUCA does not believe that relying only on enforcement processes to ensure that carrier change charges are just and reasonable will be an efficient or effective means of doing so.

harbor amount, if its costs are high enough to convince the Commission to approve the higher charge. Yet the tendency will be, as it has been, for the safe harbor amount to be charged by most carriers.

The Commission notes that its initial decision on the $5 was based in part on the difficulty of assessing actual costs incurred by carriers for performing PIC changes. NPRM, ¶ 14. This is no longer the case: Carriers, the Commission and consumer advocates alike have vastly more experience with cost analysis, particularly incremental cost analysis, today than in 1984. The greatest impetus to this experience, of course, has come from the development and implementation of the total element long-run incremental cost ("TELRIC") methodology by this Commission and state commissions.[11] This cost analysis is of value for identifying the appropriate safe harbor level, and would not require a cost analysis for every ILEC.

To the extent that the PIC change charge covers the ILEC's costs, the discussion of "excessive" PIC changes makes little sense.

The Commission notes that SBC suggests that "excessive" PIC changes would justify an increased charge. NPRM, ¶ 17.[12] Presumably the increased charge would kick in when the number of carrier changes submitted by a specific customer reached a level

[11] At this point it appears that the general advances in costing expertise will be more useful than attempting to identify TELRIC proxies for PIC change charges from the unbundled network element platform ("UNE-P") migrations, as suggested in the NPRM at ¶ 20.

[12] NASUCA does not agree with the Commission's characterization of SBC's comments. SBC seems to be pointing to the Commission's 1984 decision that excessive carrier changes should be deterred, as a reason not to hold a rulemaking, rather than affirmatively proposing charges for excessive carrier changes.

that the Commission had determined to be "excessive." Clearly, any such number would be arbitrary.[13]

More importantly, an increased charge for, e.g., the tenth carrier change request in a certain period assumes that the tenth change imposes costs on the ILEC that the ninth change request did not. As noted above, however, NASUCA proposes that the PIC-change charge be based on the carriers' costs of making those changes. Under this presumption, the ILEC should be neutral about the number of changes requested by a single customer.

The Commission cannot rely on market forces to ensure reasonable carrier switching charges.

The Commission asks "whether we can rely on market forces to ensure reasonable rates." NPRM, ¶ 14. "Market forces" will simply not constrain ILECs in their imposition of these charges. Where there is no local exchange competition (particularly for residential consumers), customers have no choice but to accept the ILEC's carrier change charge. And the ILEC has no interest in reducing that charge.[14]

Even where there is local competition, market forces are unlikely to discipline the carrier change charge. The carrier change charge is hardly a prominent feature of a local carrier's rates; the notion that a customer would refrain from switching local carriers because of the local carrier's PIC-change charge is fundamentally far-fetched.

[13] Both in terms of the number of changes submitted and the period over which a "non-excessive" number of changes could be requested.

[14] This is true even when the ILEC is required to assess a carrier change charge when consumers opt for the ILEC's affiliated long-distance carrier (or for carriage by the ILEC itself).

To the extent that changing a customer's interLATA carrier and intraLATA carrier simultaneously creates different costs, this should be recognized.

The Commission notes that "end users may change both their interLATA and intraLATA carriers simultaneously to a single carrier…." and that ILECs may impose two carrier change charges for the transaction. NPRM, ¶ 18. Obviously, customers may also attempt to change their interLATA carrier to one IXC and their intraLATA carrier to a *different* IXC in the same transaction. A customer could also seek to change only the customer's interLATA carrier, or only the intraLATA carrier. It is not clear whether the ILEC is exposed to different costs for those four scenarios.

Only if the ILECs are able to show that the costs are significantly different for changing both inter- and intraLATA carriers at the same time should greater carrier change charges be imposed. It seems highly unlikely that an ILEC's costs for doing two carrier changes simultaneously could be the same as doing one carrier change one day and another carrier change a week later. Thus carriers' current practice of charging a double carrier change charge when two carriers are changed at the same time is likely inappropriate.

The Commission should not allow a higher charge for consumers who have a "PIC freeze."

"PIC freeze" is a service provided by the LEC that prevents a carrier change that is based solely on an automated submission by the IXC. NPRM, ¶ 17. SBC has suggested that, because customers with PIC freezes require more manual intervention by the LEC when they do change carriers, the change charge for customers with PIC freezes should be higher. *Id.*

Customers opt for PIC freezes out of a concern that, without the freeze, their carrier may be changed without their consent or knowledge. Such "slamming" is a frequent enough occurrence that customers should not have to pay extra for the protection of the PIC freeze.[15] Having opted for this protection, which should be free, a customer should not then be hit with an additional charge when affirmatively changing carriers. This is particularly true given that, in the experience of NASUCA members, customers who request PIC freezes often do so in response to suggestions by ILEC customer service representatives.

On the other hand, again in the experience of NASUCA members, there appear to be numerous instances where the ILEC has placed a PIC freeze on a customer's account without the customer's consent. In that event, to impose a higher PIC change charge because of the involuntary PIC freeze would be adding insult to injury.

The Commission should include in the PIC-change charge only the incremental costs of switching carriers. Other costs, such as those associated with slamming, should not be included.

The Commission noted that, when arguing that the $5 change charge safe harbor is reasonable, the ILECs

> rely on costs associated with responding to allegations by end users of unauthorized PIC changes, commonly known as "slamming," as evidence that costs related to PIC changes have not been reduced by automation. …

[15] Automated carrier changes benefit the carriers as much as their customers.

> The LECs' argument would expand the types of costs to be recovered through the PIC-change charge.

NPRM, ¶ 10. The Commission's conclusion was correct.

There is no reason why the costs of investigating unauthorized carrier changes should be imposed on customers whose carrier changes *are* authorized. These costs should be imposed upon the carriers that make such investigation necessary, the slammers themselves, as an additional disincentive to ordering carriers change without proper authorization.[16]

ILECs should be required to assess PIC change charges on transactions where the IXC is an affiliate of the ILEC.

There is a dispute over whether the RBOCs charge a PIC-change charge when the customer switches to an RBOC affiliate as the presubscribed IXC. This problem could grow as the RBOCs receive § 271 authority. CompTel (at 5) asserts that the RBOCs do not assess the charge. Verizon (at 3), for its part, says that its local companies do charge the PIC change charge for switches to its affiliated interLATA carrier.

In any event, the Commission should direct that when a LEC charges the PIC change charge to unaffiliated IXCs, the ILEC must assess the charge when the IXC is an affiliate.[17] Otherwise, the LEC and its affiliate gain an unfair competitive advantage.[18]

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[16] If complete granularity and causality were to be observed, it might be justified to impose an additional charge on consumers who allege an unauthorized PIC change when the change was in fact authorized. One doubts whether charges of slamming are brought frivolously, however. Imposing a charge on unsuccessful slamming allegations might discourage some meritorious allegations.

[17] Or, in fact, when the switch is to the long distance operation of the LEC itself.

[18] Obviously, there is nothing to stop the long distance carrier (whether LEC affiliate or LEC itself) from agreeing to absorb the customer's charge, as is the case for many long distance carriers today.

Conclusion

For the reasons stated herein, the Commission should adopt, after investigation, a safe harbor PIC-change charge that reflects current costs of changing carriers. The Commission should also adopt positions consistent with these comments on the other issues addressed.

Respectfully submitted,

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